No. October Term, 1924

IN THE

Supreme Court of the United States

READING COMPANY, SUCCESSOR OF PHILADELPHIA & READING RAILWAY COMPANY,
Petitioner,

vs.

JOHN L. KOONS, ADMINISTRATOR OF LESTER M. KOONS, *Respondent.*

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI

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PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

The question involved in this case is as follows:

In an action against an interstate carrier, instituted under the provisions of the Federal Employers' Liability Act by an administrator to recover for the death of an employe of defendant, killed while engaged in interstate commerce, does the two years' limitation fixed by the act of Congress begin to run from the date of death of such employe or from the date of the appointment of the administrator?

The determination of this question requires the construction of Section 6 of the Act of Congress of April 22, 1908, as amended by the Act of April 5, 1910, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases" (35 Stat. 66; 36 Stat. 291; U. S. Compiled Statutes 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

Under this Act an action to recover damages for death must be in the name of a personal representative of the deceased.

American R. R. of Porto Rico *vs.* Birch, 224 U. S. 547, St. Louis S. F. & T. R. R. *vs.* Seale, 229 U. S. 156.

This suit, brought by the Administrator under the Federal Act, is an entirely different action from the suit of John L. and Malinda D. Koons, instituted by them as surviving parents under the state law, and cannot in any way be tacked on to that proceeding.

Giersch *vs.* Railroad, 171 Pac. 591, 596.

> "An action by a widow in her individual capacity under the state law is an entirely different action from the one brought by her as Administratrix under the Federal Employers' Liability Act."
>
> Troxel *vs.* D. L. & W. R. R. 227 U. S. 434.

Under Pennsylvania practice, whether the claim was barred by the limitation clause contained in the Act of Congress was properly raised by the rule to show cause why judgment of non pros. should not be entered because the writ was not issued in time: Prettyman *vs.* Irwin, 273 Pa. 522; 117 Atlantic 195.

While the exact question as to when a cause of action for death accrues under the Federal Act has not been passed upon by your Honorable Court, in at least one case it was assumed that the statute began to run from the date of death and not from the time of the issuance of letters on the estate of decedent.

In Roberts on Federal Liability of Carriers, Volume 2, Page 1142, the learned author says:

> "Whether an action under the Federal act must be brought within two years of the date of death of an employe or within two years from the appointment of an administrator, has not been specifically decided by the national Supreme Court; though it seems to have been taken for granted in Missouri K. & T. R. Co. *v.* Wulf that the statute began to run from the time the death occurred."

In the Wulf case referred to, reported in 226 U. S. 570, plaintiff in her individual capacity instituted suit on January 23, 1909, to recover for the death of her son, who was killed on November 27, 1908. On January 4, 1911, or more than two years after date of death, plaintiff took out letters of administration on the estate of her son, and amended her pleadings by changing the party plaintiff from Sallie C. Wulf to Sallie C. Wulf, Administratrix. Under the facts of the case, and in view of the averments contained in the original petition, the Court held that the amendment was not "equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Section 6 of the employers' liability act." Clearly, therefore, this Court in that case assumed that the two year limitation ran from the date of death and not from the time letters were taken out, as the amended petition was filed within a few days after the appointment of the Administratrix. It is noted in the

report of the decision that Mr. Justice Lurton "entertains doubts as to whether the two years' limitation does not apply."

The decisions construing Section 6 of the Federal Act, when the question has been squarely raised as to when the cause of action for death accrues, are not uniform.

The leading case, holding that the limitation does not begin to run until the appointment of a personal representative, and the one which the trial court regarded as controlling, is American Railroad of Porto Rico *vs.* Coronas, 230 Fed. 545, decided by the Circuit Court of Appeals for the First Circuit in 1916. In that case, after reviewing numerous authorities, the Court concludes:

> "In view of the well recognized rule heretofore pointed out as to when a right of action accrued—which Congress must have had in mind when enacting the present law—and in view of the fact that Lord Campbell's Act upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that in the enactment of the present law Congress declined to adopt such limitation and fixed the period from the time the action accrued, we are of opinion that the proper construction of the statute is that the right of action did not accrue so that the limitation attached, until the administrator was appointed, and that the demurrer was properly overruled."

The "well recognized rule," to which the Court refers, is founded upon the doctrine laid down in an old English case, Murray, Admr. *vs.* East India Company, 5 Barn. & Ald. 204. This was an action by an administrator with the will annexed upon a bill of exchange

made payable to the testator, but accepted after his death. The acceptance of the bill and the date of payment were more than six years before suit was brought, but administration was first taken out less than six years before, and it was held that the statute of limitation began to run from the granting of the letters of administration, and not from the time the bill became due. The Court points out that at the date of acceptance, or the date of payment of the bill, there was no person in existence who could acquire a right of action by the acceptance and non-payment. In reaching its conclusion, the Court said:

> "Now, independently of authority, we think that it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing."

This is the basis of the decision. The debt was due to the estate, and any recovery would be for the benefit of the estate, to be distributed with other assets in accordance with the provisions of the testator's will, but until an administrator c. t. a. was appointed, there was no person capable of suing, no person who could be guilty of laches in not suing.

It is respectfully submitted that the Circuit Court of Appeals in the Coronas case erred in following the doctrine of the Murray case. The Murray case was on contract, based upon a valid consideration. The debt was due to the estate, but until the administrator was appointed there was no person in a position to institute suit and protect the estate. There was no person to whom laches could be imputed. In the Coronas case, the right to recover was based upon proof of negligence of the character described in Section 1 of the Federal Employers' Liability Act, and proof that there were beneficiaries within one of the classes designated by the statute, who had suffered pecuniary loss by reason

of the death by wrongful act. The intestate of Coronas at death left his father and mother as surviving statutory beneficiaries, who were entitled to any amount recovered to the exclusion of creditors of the estate and all others: American R. R. of Porto Rico *vs.* Birch, 224 U. S. 547. The surviving parents were the actual parties in interest and the administrator was merely an agent through whom suit was brought. Murray administrator, represented the estate; Coronas, as administrator, represented his intestate's living parents, to whom any judgment recovered would be payable to the exclusion of the intestate's estate. In the Murray case, the recovery was estate funds; in the Coronas case, it was not estate funds. The surviving parents suffered this pecuniary loss at the time of death; their right to recover was then complete, and their failure to secure the appointment of an administrator, the agent designated by the Act of Congress to bring the suit in their behalf, for more than two years after they had sustained this loss, barred their right to recover.

In the Murray case, the statute under consideration was purely a statute of limitation, while the Federal Act involved in the Coronas case is more than the ordinary statute of limitation. Under such a statute, the lapse of time not only bars the remedy but destroys the liability.

A. J. Phillips Co. *vs.* Grand Trunk R. R., 236 U. S. 662.

Central Vermont Ry Co. *vs.* White, 238 U. S. 507, 511.

Atlantic Coast Line *vs.* Burnette, 239 U. S. 199.

> "A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitation. It is a statute of creation, and the com-

> mencement of the action within the time it fixes is an indispensable condition of the liability and of the the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted, in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability."

Partee *vs.* St. L. & S. F. R. Co., 204 Fed. 970.

Nearly all of the decisions cited by the Circuit Court of Appeals in the Coronas case are founded upon contract, involved funds due to or by an estate, and follow the doctrine of Murray, Administrator, *vs.* East Indian Co., supra, the earlier cases citing that decision as authority. It is submitted that neither the Murray case, nor any decision following it, should be regarded as a precedent in determining the point of time marking the commencement of the running of the limitation contained in the Federal Employers' Act.

In the Coronas case, the Court, in arriving at the conclusion that the cause of action did not accrue until the appointment of the administrator, lays stress upon the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the time of death and that in the enactment of the present law Congress declined to adopt such a limitation and fixed the period from the time the cause of action accrued. It must be remembered, however, that Lord Campbell's Act related only to actions for death, whereas Section 6 of the Act of Congress providing that "no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued"

> petent and empowered to bring suit. That the cause of action accrued when the employe died from the injuries suffered in the employer's service is not in doubt. The cause of action for damages for the death of the employe, Bixler, was perfected and immediately accrued when he was killed."

A like conclusion was reached by the District Court of the United States for the District of New Jersey in Guinther, Administratrix, *vs.* Philadelphia & Reading Railway Company, not reported. This decision, however, as stated above, was reversed by the Circuit Court of Appeals for the Third Circuit, which decision would now be binding upon the District Court for the Middle District of Pennsylvania, which decided the Bixler case.

In Giersch *vs.* Atchinson, T. & S. F. R. R. Co., 171 Pac. 591 (1918) the Supreme Court of Kansas refused to recognize the doctrine of the Coronas case, which is reviewed in the opinion, the Court, in referring to the Federal Act, saying:

> "It has repeatedly been said to be similar to the Lord Campbell Act and in fixing the limitation at two years it is difficult to conceive that it was intended that all this time and more might elapse before an administrator must be appointed, and that he would then have two years longer in which to sue, which would be the case if the time ran from his appointment and not from the death of the decedent. While, of course, this is a question finally for the Federal Supreme Court, we hold that, in view of the authorities now obtainable, the action must be brought within two years from the time of death, and therefore that the administratrix in this case cannot prevail."

There was in that case a dissenting opinion by two Judges, but the dissent was on the question whether an amendment made more than two years after death did introduce a new cause of action, as decided by the majority of the Court. The dissenting Judges apparently agreed with the conclusion that the statute began to run from time of death.

In Seaboard Air Line *vs.* Brooks, 107 S. E. 878 (1921) the Supreme Court of Georgia likewise refuses to follow the Coronas case, and, after reviewing many authorities, holds that the two year limitation runs from the date of death, and not from the date of the appointment of the administrator. The exact question was certified to the Supreme Court by the Court of Appeals for instructions. After quoting an excerpt from Tiffany on Death by Wrongful Act, the Court say:

> "The author proceeds to show that when the limitation prescribed mentions a certain period, such as 'after the death' or after the injury, no confusion results, but when the period is within a specified time after the cause of action 'accrues' the necessity for construction in connection with the other provisions of the particular statute arises. It is also shown that the recovery by the personal representative is for the benefit of designated relatives, and does not become a part of the estate of the deceased, and such personal representative is a mere nominal party, whose only duty on the receipt of the proceeds of a recovery is to pay the same to the proper beneficiaries. It is generally agreed that where a recovery is sought by a personal representative for the benefit of the 'estate of the deceased person', the cause of action does not accrue until the appointment of an administrator, because until then there is in existence no person capable of suing."

The Court further say (Pages 880 and 881):

"The Coronas case contains an elaborate opinion, which discusses and reviews practically every case presented in the briefs of both parties to the present case, including the Bixler case. Many of the cases cited in the Coronas case deal with ordinary statutes of limitation. If the limitation with which we have to deal were in an ordinary statute applicable to a suit for recovery of a judgment for the benefit of the estate of a deceased, which view we have rejected, it would necessarily follow that it begins to run only with the appointment of an administrator."

* * * * * * * * *

"We conclude from what precedes that the cause of action 'accrues' upon the death of the employe. This seems consonant with the fact that representation of the estate may be had at any time upon the application of the beneficiaries; that the carrier owes no duty to move such appointment."

* * * * * * * * *

"The identical question was involved in the case of Williams *vs.* W. & A. R. Co., 24 Ga. App. 750, 102 S. E. 186, and a petition for certiorari was filed in this court to review the judgment rendered by the Court of Appeals. After careful examination and consideration of the question, this court was then of the opinion that the decision of the Court of Appeals, citing the case of American R. Co. *vs.* Coronas, supra, presented the better view of the question. There were, however, as we have shown above, decisions in which a contrary view was taken. The same question coming again be-

fore the Court of Appeals, that court has certified it to this court; and, on further consideration of the question, we have reached a different conclusion, which we think is sustained by the better reasoning."

Under the authorities last cited, the present action is barred by the statute. When John L. and Malinda D. Koons brought their action under the state law, they averred that they had sustained damage by reason of the death of their son, Lester M. Koons, on April 23, 1915, on which day their cause of action in that proceeding, if any they had, accrued. The same persons, John L. and Malinda D. Koons, are the designated beneficiaries in this proceeding, brought by their agent, John L. Koons, Administrator, under the Federal law, and the judgment on the verdict, entered in the court below, represents the damage sustained by them by reason of the death of their son on April 23, 1915, through the alleged negligent act of defendant. Their loss occurred on that day and their right to damages under the Federal act accrued on that day, provided they could show that the defendant was negligently responsible for the death of their son. It is idle to say that on September 23, 1921, when letters on the estate of Lester M. Koons were issued, more than six years after the commission of the alleged negligent act which resulted in death, a new cause of action against the defendant accrued to John L. Koons, Administrator, to recover for the benefit of himself, in his individual capacity, and his wife, damages which they sustained on the day death occurred. So far as the defendant is concerned, its liability for negligence accrued on the day of the unfortunate accident, which resulted within a few hours thereafter in the death of its employe, at which time the surviving parents, the real parties in interest, sustained their loss. From that date on, it

was within the power of the surviving father, who under the laws of Pennsylvania was entitled to administer the estate of his unmarried son, to take out letters of administration, and institute suit for the benefit of himself and his wife. In his failure to do so for more than two years after the date of death, he was guilty of laches. When suit was instituted, his right to recover as an administrator for the benefit of himself and wife had been lost, and the liability of the defendant had ended. In the first suit brought by John L. and Malinda D. Koons under the state law, while it is true no affidavit of defense was filed for the reason that none was required, the attention of counsel for plaintiffs, before the close of the case in chief, was called to the fact that both the defendant company and the deceased employe had been engaged in interstate commerce at the time of the occurrence of the alleged negligent act, and that, therefore, the Federal Act controlled. Plaintiffs elected, however, to stand on the suit as brought, contending that the deceased had not been engaged in interstate commerce at the time of the happening of the accident. The plaintiffs in that position were not sustained by the trial Court or by the Supreme Court of Pennsylvania, the judgment being that the deceased employe had been engaged in interstate commerce and that, therefore, there could be no recovery in the suit as instituted. It is regrettable that if the surviving parents, real parties in interest, had a good cause of action against this defendant, it has been lost, but the defendant was in no way responsible for this result.

While the amount of the judgment in this case is not great, the principle involved is of the utmost importance to petitioner and other railroad companies. Under Pennsylvania law, there is no limitation as to the time within which letters of administration must be taken out. The survivors of an employe who had

been killed could wait, say fifteen years, twenty years or thirty years before taking out letters, and then have two years thereafter within which to institute suit, if the judgment of the learned Court below is correct. Under the law a common carrier is obliged to preserve its records for only seven years and the bringing of a suit could be deferred until all records had been destroyed, when it would be impossible to determine whether the deceased employe had been engaged in interstate commerce at the time of the accident. The first section of the Act of Congress, as pointed out by the Supreme Court of Georgia in the Brooks case, negatives any such idea. The right of action in case of the death of an employe is given to his or her personal representative for the benefit of the surviving widow or husband and children of such employe, and, if none, then to such employe's parents, and if none, to the next of kin dependent upon such employe. The right is not for the benefit of the estate generally but for persons dependent upon the employe at the time of death, indicating that the action is to be brought promptly after the commission of the negligent act. The cause of action is complete when death results from the negligent act complained of and the designated beneficiaries sustain their loss. The matter of securing the appointment of a personal representative to enforce the cause of action is wholly within the control of the beneficiaries. The common carrier is under no obligation to move, and its right to the defense of the two year limitation, fixed by the Act, should not be swept aside by permitting the beneficiaries to allow more than six years to elapse before raising up a plaintiff to institute a suit to enforce their cause of action.

As the present suit was not brought within two years after the date of death, when the cause of action accrued, there can be no recovery.

> "An action in a state court founded upon the Employers' Liability Act of April 22, 1908, must fail where the record shows that it was not begun until the time had elapsed, after which, under section 6 of that Act, no action shall be maintained."
>
> Atlantic Coast Line *vs.* Burnette, 239 U. S. 199.

It is respectfully submitted that writ of certiorari should be granted as prayed for.

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Supreme Court of the United States

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JOHN L. KOONS,
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BRIEF FOR PETITIONER

(30,713)

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REPORTS OF OPINIONS IN THE COURTS BELOW

The opinion of the trial Court, Common Pleas of Dauphin County, Pennsylvania, overruling petitioner's motion for judgment of non pros., is reported in John L. Koons, Administrator of Lester M. Koons, *vs.* Philadelphia & Reading Railway Company, 26 Dauphin County Reports 234; the opinion of the Supreme Court of Pennsylvania, affirming the judgment of the Court below, is reported in 281 Pa. 270; 126 Atlantic 381.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Judgment of Court of Common Pleas of Dauphin County affirmed by the Supreme Court of Pennsylvania on October 6, 1924. (R. 19, 20)

The sole question of law involved in this case is as follows:

> In an action against an interstate carrier instituted under the provisions of the Federal Employers' Liability Act by an administrator to recover for the death of an employe of defendant, killed while engaged in interstate commerce, does the two years' limitation fixed by the Act of Congress begin to run from the date of death of such employe or from the date of the appointment of the administrator?

Suit was instituted under the provisions of the Act of Congress of April 22, 1908, c. 149 (35 Stat. 65, U. S. Compiled Stats. 1916, Section 8657) entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases" more than six years after the death of the employe of the petitioner, but within a few months after the respondent had been appointed administrator of his estate. The claim advanced by the petitioner was that, as the action had not been commenced within two years from the date of death of the employe, it was barred by Section

6 of the said Act of Congress of April 22, 1908, c. 149, as amended by the Act of April 5, 1910, c. 143 (35 Stat. 66, 36 Stat. 291; U. S. Compiled Stats. 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued." (R 18)

The Court below ruled that the cause of action did not accrue until the appointment of a personal representative of the deceased capable of suing, and that the suit was instituted within the statutory period after such appointment. (R. 19, 20.)

The judgment of the Court below denied to the petitioner a right, privilege and immunity under the limitation clause of the said Act of Congress, known as the Federal Employers' Liability Act, which was duly set up and claimed in the trial Court and in the Supreme Court of Pennsylvania, and under Section 237 of the Judicial Code, as amended, Act September 6, 1916, c. 448, 39 Stat. 726 (Compiled Stats. 1916, 1214) and Act February 17, 1922, c. 54, 42 Stat. 366 (Compiled Stats. 1923 Sup. 1214) and the authorities cited, the jurisdiction of this Court was invoked by a petition for writ of certiorari, to the end that the judgment of the Supreme Court of Pennsylvania might be reviewed and determined by this Court: Philadelphia & Reading Coal & Iron Co. *vs.* Gilbert, 245 U. S. 162; Dana *vs.* Dana, 250 U. S. 220.

STATEMENT OF THE CASE

This is an action in trespass instituted in the Court of Common Pleas of Dauphin County, Pennsylvania, on February 6, 1922, by John L. Koons, Administrator of Lester M. Koons, against the Philadelphia & Reading Railway Company to recover for the death of the said Lester M. Koons, who, while in the employ of the said Company at

a place commonly known as Rutherford Yards, Dauphin County, Pennsylvania, on or about the 22nd day of April, 1915, sustained injuries from which he died on the same day or in the early hours of the 23rd of April, 1915. The suit was brought under the provisions of the Act of Congress of April 22, 1908, c. 149 (35 Stat. 65, U. S. Compiled Stats. 1916, Section 8657) entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases" for the benefit of the surviving parents, John L. Koons and Malinda D. Koons, the said John L. Koons being the Administrator of the estate. (R. 12). The case involves the construction of Section 6 of the said Act of Congress of April 22, 1908, c. 149, as amended by the Act of April 5, 1910, c. 143 (35 Stat. 66, 36 Stat. 291; U. S. Compiled Stats. 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

On April 20, 1916, the said John L. Koons and Malinda D. Koons, as surviving parents of the said Lester M. Koons, brought their action against the Philadelphia & Reading Railway Company in the Court of Common Pleas of Dauphin County, to recover for the death of said Lester M. Koons, the suit being under the statutes in force in the Commonwealth of Pennsylvania. In that action, before the close of plaintiff's case, defendant specifically called attention to the fact that both the Company and the deceased were engaged in interstate commerce at the time Koons met his death, and that therefore the only right of action was under the Federal Employers' Liability Law, which required that the suit be in the name of a personal representative. No motion to amend with respect to the parties plaintiff was made, the plaintiffs electing to stand on the suit as brought, contending that the decedent was not engaged in interstate commerce at the time of the accident. In this proceeding, the trial court on April 3, 1920, entered judgment in favor of the defendant n. o. v. on the ground that decedent had been so engaged in interstate commerce when

injured and that there could be no recovery in a suit instituted by his surviving parents. This judgment was affirmed by the Supreme Court of Pennsylvania on appeal on July 1, 1921, the decision being reported in 271 Pa. 468, 114 Atlantic 262. It was thus definitely determined that any recovery for the death of the said Lester M. Koons could be had only under the provisions of the Federal Act.

Thereafter, on September 23, 1921, the said John L. Koons, the father of decedent, and one of the plaintiffs in the above recited proceedings, took out letters of administration on the estate of his son, and on February 6, 1922, more than six years after the death of the said Lester M. Koons, brought this suit.

The defendant thereupon presented its petition, setting forth all of the pertinent facts and praying that judgment of non pros. be entered for the reason that the action, instituted more than two years after the date of death, was barred by the limitation contained in the Act of Congress, upon which petition a rule was granted upon plaintiff to show cause why the judgment prayed for should not be entered. Plaintiff answered, averring that the action was commenced within two years from the date the cause of action accrued, and praying that the rule be discharged. (R. 2, 3, 4, 5). After argument the Court of Common Pleas discharged the rule absolutely and overruled the motion for judgment of non pros., holding that the limitation contained in the Act of Congress did not begin to run until the appointment of the plaintiff as administrator and that the action was commenced within the statutory period after such appointment. (R. 5).

When the case came on for trial on the merits, plaintiff and defendant stipulated of record that, subject to the legal question involved, under the exception noted, with the right of appeal reserved, a verdict should be taken in favor of the plaintiff and against the defendant in the sum of $2510. (R. 15) Accordingly a verdict was rendered in the amount stated, upon which, on October 23, 1923, judgment was entered, (R. 15), from which an appeal was taken to the Supreme Court of Pennsylvania, which Court on October 6, 1924, affirmed the judgment of the Court of Com-

mon Pleas. (R. 19). On October 25, 1924, the Supreme Court refused a petition for reargument. (R. 23).

After the above recited judgment had been entered against the said Philadelphia & Reading Railway Company, and after an appeal had been taken to the Supreme Court of Pennsylvania, the said Philadelphia & Reading Railway Company was on December 31, 1923, merged with Reading Company, your petitioner, under the final decree of the United States District Court for the Eastern District of Pennsylvania, pursuant to the mandate of your Honorable Court in the case of United States of America *vs.* Reading Company, et al., 253 U. S. 26, and under the merger agreement the said judgment is an obligation of Reading Company.

On the petition of Reading Company, as successor of the Philadelphia & Reading Railway Company, entered to No. 748 October Term, 1924, your Honorable Court on January 5, 1925, granted a writ of certiorari to the Supreme Court of the State of Pennsylvania (R. 25).

SPECIFICATION OF ERROR

The Supreme Court of Pennsylvania erred in overruling the assignment of error (R. 18), that the Court of Common Pleas of Dauphin County, Pennsylvania, erred in overruling the petition for judgment of non pros. for the reason that the action was barred by the two year limitation contained in the Act of Congress, and in discharging the rule to show cause granted thereon, and in affirming the judgment of the said Court of Common Pleas of Dauphin County on the ground that the cause of action did not accrue until the appointment of respondent as administrator of the deceased.

ARGUMENT

The question of law involved in this case is as follows:

> In an action against an interstate carrier, instituted under the provisions of the Federal Employers' Liability Act by an administrator to recover for the death of an employe of defendant, killed while engaged in interstate commerce, does the two years' limitation fixed by the Act of Congress begin to run from the date of death of such employe or from the date of the appointment of the administrator?

The determination of this question requires the construction of Section 6 of the Act of Congress of April 22, 1908, as amended by the Act of April 5, 1910, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases" (35 Stat. 66; 36 Stat. 291; U. S. Compiled Statutes 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

Under Pennsylvania practice, whether the claim was barred by the limitation clause contained in the Act of Congress was properly raised by the rule to show cause why judgment of non pros. should not be entered because the writ was not issued in time: Prettyman *vs.* Irwin, 273 Pa. 522; 117 Atlantic 195.

Under the Act of Congress an action to recover damages for death must be in the name of a personal representative of the deceased.

American R. R. of Porto Rico *vs.* Birch, 224 U. S. 547,
St. Louis S. F. & T. R. R. *vs.* Seale, 229 U. S. 156.

This suit, brought by the Administrator under the Federal Act, is an entirely different action from the suit of

John L. and Malinda D. Koons, instituted by them as surviving parents under the state law, and cannot in any way be tacked on to that proceeding.

Giersch *vs.* Railroad, 171 Pac. 591, 596.

> "An action by a widow in her individual capacity under the state law is an entirely different action from the one brought by her as Administratrix under the Federal Employers' Liability Act."

Troxel *vs.* D. L. &. W. R. R. 227 U. S. 434.

While the exact question as to when a cause of action for death accrues under the Federal Act has not been passed upon by your Honorable Court, in at least one case it was assumed that the statute began to run from the date of death and not from the time of the issuance of letters on the estate of decedent.

In Roberts on Federal Liability of Carriers, Volume 2, Page 1142, the learned author says:

> "Whether an action under the Federal act must be brought within two years of the date of death of an employe or within two years from the appointment of an administrator, has not been specifically decided by the national Supreme Court; though it seems to have been taken for granted in Missouri K. & T. R. Co. *v.* Wulf that the statute began to run from the time the death occurred."

In the Wulf case referred to, reported in 226 U. S. 570, plaintiff in her individual capacity instituted suit on January 23, 1909, to recover for the death of her son, who was killed on November 27, 1908. On January 4, 1911, or more than two years after date of death, plaintiff took out letters of administration on the estate of her son, and amended her pleadings by changing the party plaintiff from Sallie C. Wulf to Sallie C. Wulf, Administratrix. Under the facts of the case, and in view of the averments contained in the

original petition, the Court held that the amendment was not "equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Section 6 of the employers' liability act." Clearly, therefore, this Court in that case assumed that the two year limitation ran from the date of death and not from the time letters were taken out, as the amended petition was filed within a few days after the appointment of the Administratrix. It is noted in the report of the decision that Mr. Justice Lurton "entertains doubts as to whether the two years' limitation does not apply."

In the Wulf case it is to be noted that this Court squarely held that the amendment changing the party plaintiff from Sallie C. Wulf in her individual capacity to Sallie C. Wulf, Administratrix, did not introduce a new cause of action, the amendment merely relating back to the cause of action originally asserted. The cause of action was originally asserted by her as the beneficiary under the Act, and this Court therefore held that in this capacity she had a cause of action at the time the suit was instituted, or in other words, that the cause of action accrued when she suffered the injury, at the date of the death of her son, and not when she was appointed Administratrix. If no cause of action accrued until her appointment as Administratrix, there was no action to which the amendment could relate back. Under this decision, therefore, it is possible for the designated beneficiary to bring suit as an individual at any time after death and thereafter substitute a personal representative of the deceased as party plaintiff without introducing a new cause of action, provided the original pleadings show the case to be within the Federal Act. The bringing of the suit need not be deferred until after the appointment of a personal representative.

This Court, where an amendment of the pleadings has been allowed, has repeatedly cited the Wulf case with approval, holding that if the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted it related back to the commencement of the action and was not affected by the intervening lapse of time: Seaboard Air Line R. R. *vs.* Renn, 241 U. S. 290; New York

Central & Hudson River R. R. *vs.* Kinney, 260 U. S. 340. In this last mentioned case this Court say:

> "In Missouri, K. & T. R. Co. *v.* Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas, 1914B, 134, the declaration was by the mother as sole heir and next of kin of an employee of the plaintiff in error, in terms referring to a statute of Kansas giving her a right of action for injuries resulting in death. An amendment was allowed, more than two years after the injury, in which the plaintiff declared both as sole beneficiary and next of kin and as administratrix, and relied both on the Kansas law and on the act of Congress. The plaintiff got a judgment under the act of Congress, which was sustained by this Court, although the original declaration by the plaintiff could not be attributed to the Employers' Liability Act, because the plaintiff sued only in her personal capacity, and relied for that, as she had to, upon the Kansas law. 226 U. S. 576. It is true that the fact of the injury arising in interstate commerce was pleaded by the defendant. But it was pleaded as a bar to the action as it then stood, and only makes more marked the changes that the amendment introduced. We do not perceive that the effect of the amendment in that case distinguished it from this. It really is a stronger case, because, as we have said, here the declaration was consistent with a wrong under the law of the state or of the United States, as the facts might turn out. The amendment merely expanded or amplified what was alleged in support of the cause of action already asserted . . . and was not affected by the intervening lapse of time."
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> New York Central & Hudson River R. v. Kinney, 260 U. S. 340, 345.

In the above case, decided in 1922, this Court again assumed that in the Wulf case the cause of action under the

Federal Employers' Liability Act accrued at the time of the death of the employee of the railroad company and not upon the appointment of the administratrix, the Court saying, as above quoted, "the amendment was allowed more than two years after the injury."

The decisions construing Section 6 of the Federal Act, when the question has been squarely raised as to when the cause of action for death accrues, are not uniform.

The leading case, holding that the limitation does not begin to run until the appointment of a personal representative, and the one which the trial court regarded as controlling, is American Railroad of Porto Rico *vs.* Coronas, 230 Fed. 545, decided by the Circuit Court of Appeals for the First Circuit in 1916. In that case, after reviewing numerous authorities, the Court concludes:

> "In view of the well recognized rule heretofore pointed out as to when a right of action accrued—which Congress must have had in mind when enacting the present law—and in view of the fact that Lord Campbell's Act upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that in the enactment of the present law Congress declined to adopt such limitation and fixed the period from the time the action accrued, we are of opinion that the proper construction of the statute is that the right of action did not accrue so that the limitation attached, until the administrator was appointed, and that the demurrer was properly overruled."

The "well recognized rule," to which the Court refers, is founded upon the doctrine laid down in an old English case, Murray, Admr. *vs.* East India Company, 5. Barn. & Ald. 204. This was an action by an administrator with the will annexed upon a bill of exchange made payable to the testator, but accepted after his death. The acceptance

of the bill and the date of payment were more than six years before suit was brought, but administration was first taken out less than six years before, and it was held that the statute of limitation began to run from the granting of the letters of administration, and not from the time the bill became due. The Court points out that at the date of acceptance, or the date of payment of the bill, there was no person in existence who could acquire a right of action by the acceptance and non-payment. In reaching its conclusion, the Court said:

> "Now, independently of authority, we think that it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing."

This is the basis of the decision. The debt was due to the estate, and any recovery would be for the benefit of the estate, to be distributed with other assets in accordance with the provisions of the testator's will, but until an administrator c. t. a. was appointed, there was no person capable of suing, no person who could be guilty of laches in not suing.

It is respectfully submitted that the Circuit Court of Appeals in the Coronas case erred in following the doctrine of the Murray case. The Murray case was on contract, based upon a valid consideration. The debt was due to the estate, but until the administrator was appointed there was no person in a position to institute suit and protect the estate. There was no person to whom laches could be imputed. In the Coronas case, the right to recover was based upon proof of negligence of the character described in Section 1 of the Federal Employers' Liability Act, and proof that there were beneficiaries within one of the classes designated by the statute, who had suffered pecuniary loss by reason of the death by wrongful act. The intestate of Coronas at death left his father and mother as surviving statutory beneficiaries, who were entitled to any amount recovered to the exclusion of creditors of the estate and all others: American R. R. of Porto Rico *vs.* Birch, 224 U. S. 547. The sur-

viving parents were the actual parties in interest and the administrator was merely an agent through whom suit was brought. Murray administrator, represented the estate; Coronas, as administrator, represented his intestate's living parents, to whom any judgment recovered would be payable to the exclusion of the intestate's estate. In the Murray case, the recovery was estate funds; in the Coronas case, it was not estate funds. The surviving parents suffered this pecuniary loss at the time of death; their right to recover was then complete, and their failure to secure the appointment of an administrator, the agent designated by the Act of Congress to bring the suit in their behalf, for more than two years after they had sustained this loss, barred their right to recover.

In the Murray case, the statute under consideration was purely a statute of limitation, while the Federal Act involved in the Coronas case is more than the ordinary statute of limitation. Under such a statute, the lapse of time not only bars the remedy but destroys the liability.

A. J. Phillips Co. *vs.* Grand Trunk R. R. 236 U. S. 662.
Central Vermont Ry. Co. *vs.* White, 238 U. S. 507, 511.
Atlantic Coast Line *vs.* Burnette, 239 U. S. 199.

> "A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitation. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted, in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability."

Partee *vs.* St. L & S. F. R. Co. 204 Fed. 970.

The distinction between the ordinary statute of limitation and the limitation clause contained in the Federal Employer's Liability Act is clearly recognized by this Court in the late case of William Danzer & Co. *vs.* Gulf & Ship Island R. R. Co., decided June 8, 1925, wherein this Court say:

> "We need not re-examine the doctrine of Campbell *v.* Holt, 115 U. S. 620, 20 L. ed. 483, 6 Sup. Ct. Rep. 209, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations, the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained, and that such repeal did not deprive the debtor of his property without due process of law, in violation of the 14th Amendment. The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the Statute of Limitations related to the remedy only, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act (The Harrisburg, 119 U. S. 199, 214, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140) and **those arising under the Federal Employers' Liability Act* (April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. Sec. 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208; Central Vermont R. Co. *v.* White, 238 U. S. 507, 511, 59 L. ed. 1433,

Italics ours.

1436, 35 Sup. Ct. Rep. 865, Ann. Cas 1916B, 252, 9 N. C. C. A. 265; Atlantic Coast Line R. Co. *v.* Burnette, 239 U. S. 199, 201, 60 L. ed. 226, 227, 36 Sup. Ct. Rep. 75, 17 N. C. C. A. 144; Kannellos *v.* Great Northern R. Co. 151 Minn. 157, 160, 186 N. W. 389; Jones *v.* Delaware L. & W. R. Co. 96 N. J. L. 197, 114, Atl. 331. See also Davis *v.* Mills, 194 U. S. 451, 452, 48 L. ed. 1067, 1070, 24 Sup. Ct. Rep. 692. This case belongs to the latter class."

William Danzer & Co. *vs.* Gulf & Ship Island R. R. Co. —U. S.—, 69 L. ed. 720, 721.

Nearly all of the decisions cited by the Circuit Court of Appeals in the Coronas case are founded upon contract, involved funds due to or by an estate, and follow the doctrine of Murray, Administrator, *vs.* East India Co., supra, the earlier cases citing that decision as authority. It is submitted that neither the Murray case, nor any decision following it, should be regarded as a precedent in determining the point of time marking the commencement of the running of the limitation contained in the Federal Employers' Act.

In the Coronas case, the Court, in arriving at the conclusion that the cause of action did not accrue until the appointment of the administrator, lays stress upon the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the time of death and that in the enactment of the present law Congress declined to adopt such a limitation and fixed the period from the time the cause of action accrued. It must be remembered, however, that Lord Campbell's Act related only to actions for death, whereas Section 6 of the Act of Congress providing that "no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued" relates not only to an action for damages for death, but also to an action by an injured employe in his own right. It is apparent, therefore, that the departure

from the language used in the Lord Campbell Act was made to cover both causes of action.

With all due respect to the Circuit Court of Appeals for the First Circuit, it is submitted that it pronounced an erroneous judgment in the Coronas case, and the later decisions which adopted it as a precedent, in construing the Federal Act, should have but little weight.

In Bird *vs.* Ft. Worth & R. G. Ry., 207 S. W. 518, the Supreme Court of Texas, in 1918, without the citation of any other authorities, and without discussion, followed the Coronas case.

In 1921, the U. S. District Court for the Western District of New York, in Kierejewski *vs.* Great Lakes Dredge & Dock Co., 280 Fed. 125, reached the same conclusion, basing its decision wholly upon the Coronas case, and in reviewing that decision, and following its fallacious reasoning, expressly states that it is based upon the view that the right of action by the personal representative does not spring from the act of negligence by which the employe was killed, but arises from the pecuniary loss and damages sustained by the beneficiaries in consequence of death. It is submitted that the language of Section 1 of the Act of Congress does not bear out this view. The common carrier engaged in interstate commerce is made "liable in damages" in case of death to the personal representative for the benefit of the designated beneficiaries, but the right of action is "for such death, resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

In a recent opinion, the Circuit Court of Appeals for the Third Circuit in Guinther, Administratrix, *vs.* Philadelphia & Reading Railway Company, 1 Fed. (2d) 85, reversing the District Court of the United States for the District of New Jersey, also held that the cause of action did not accrue and the statute did not begin to run until the appointment of the administratrix. In reaching this

conclusion, the Court, without discussion, merely followed the rule laid down in the Murray and the Coronas cases, citing those decisions among others, as authority.

In the present case the Supreme Court of Pennsylvania do not touch upon the position taken by the Railway Company that a different rule should prevail where the action is not for the benefit of the estate generally, but is instituted by the administrator merely as agent for designated beneficiaries, as was held by the Supreme Court of Georgia in Seaboard Air Line *vs.* Brooks infra. After referring to the Coronas and Guinther cases, decided by the Federal appellate courts, the Court say: "As the question raised here is identical with that passed upon in the two cases referred to and requires interpretation of a Federal statute, we will follow the construction placed upon the limitation clause by the two Federal Courts above mentioned and affirm the judgment of the Court below."

Where the question here involved was squarely raised, there appear to be four decisions holding the contrary view, that the cause of action accrues upon the death of the employe.

In 1913 the U. S. District Court for the Middle District of Pennsylvania, in Bixler *vs.* Pa. R. R. Co., 201 Fed. 553, said:

> "Some argument was indulged regarding the exact time when the cause of action accrued, whether when the employe was injured and died, or when proper parties appeared who were competent and empowered to bring suit. That the cause of action accrued when the employe died from the injuries suffered in the employer's service is not in doubt. The cause of action for damages for the death of the employe, Bixler, was perfected and immediately accrued when he was killed."

A like conclusion was reached by the District Court of the United States for the District of New Jersey in Guinther, Administratrix, *vs.* Philadelphia & Reading Railway

Company, not reported. This decision however, as stated above, was reversed by the Circuit Court of Appeals for the Third Circuit, which decision would now be binding upon the District Court for the Middle District of Pennsylvania, which decided the Bixler case.

In Giersch *vs.* Atchinson, T. & S. F. R. R. Co., 171 Pac. 591 (1918) the Supreme Court of Kansas refused to recognize the doctrine of the Coronas case, which is reviewed in the opinion, the Court, in referring to the Federal Act, saying:

> "It has repeatedly been said to be similar to the Lord Campbell Act and in fixing the limitation at two years it is difficult to conceive that it was intended that all this time and more might elapse before an administrator must be appointed, and that he would then have two years longer in which to sue, which would be the case if the time ran from his appointment and not from the death of the decedent. While, of course, this is a question finally for the Federal Supreme Court, we hold that, in view of the authorities now obtainable, the action must be brought within two years from the time of death, and therefore that the administratrix in this case cannot prevail."

There was in that case a dissenting opinion by two Judges, but the dissent was on the question whether an amendment made more than two years after death did introduce a new cause of action, as decided by the majority of the Court. The dissenting Judges apparently agreed with the conclusion that the statute began to run from time of death.

In Seaboard Air Line *vs.* Brooks, 107 S. E. 878 (1921) the Supreme Court of Georgia likewise refuses to follow the Coronas case, and, after reviewing many authorities, holds that the two year limitation runs from the date of death, and not from the date of the appointment of the administrator. The exact question was certified to the Supreme Court by the Court of Appeals for instructions.

After quoting an excerpt from Tiffany on Death by Wrongful Act, the Court say:

> "The author proceeds to show that when the limitation prescribed mentions a certain period, such as 'after the death' or after the injury, no confusion results, but when the period is within a specified time after the cause of action 'accrues' the necessity for construction in connection with the other provisions of the particular statute arises. It is also shown that the recovery by the personal representative is for the benefit of designated relatives, and does not become a part of the estate of the deceased, and such personal representative is a mere nominal party, whose only duty on the receipt of the proceeds of a recovery is to pay the same to the proper beneficiaries. It is generally agreed that where a recovery is sought by a personal representative for the benefit of the 'estate of the deceased person,' the cause of action does not accrue until the appointment of an administrator, because until then there is in existence no person capable of suing."

The Court further say (Pages 880 and 881):

> "The Coronas case contains an elaborate opinion, which discusses and reviews practically every case presented in the briefs of both parties to the present case, including the Bixler case. Many of the cases cited in the Coronas case deal with ordinary statutes of limitation. If the limitation with which we have to deal were in an ordinary statute applicable to a suit for recovery of a judgment for the benefit of the estate of a deceased, which view we have rejected, it would necessarily follow that it begins to run only with the appointment of an administrator."
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> * * * * * * * * * * * * *
>
> "We conclude from what precedes that the cause of action 'accrues' upon the death of the

employe. This seems consonant with the fact that representation of the estate may be had at any time upon the application of the beneficiaries; that the carrier owes no duty to move such appointment."

* * * * * * * * * * * * *

"The identical question was involved in the case of Williams *vs.* W. & A. R. Co., 24 Ga. App. 750, 102 S. E. 186, and a petition for certiorari was filed in this court to review the judgment rendered by the Court of Appeals. After careful examination and consideration of the question, this court was then of the opinion that the decision of the Court of Appeals, citing the case of American R. Co. *vs.* Coronas, supra, presented the better view of the question. There were, however, as we have shown above, decisions in which a contrary view was taken. The same question coming again before the Court of Appeals, that court has certified it to this court; and, on further consideration of the question, we have reached a different conclusion, which we think is sustained by the better reasoning."

Seaboard Air Line *vs.* Brooks, 107 S. E. 878.

Under the authorities last cited, the present action is barred by the statute. When John L. and Malinda D. Koons brought their action under the state law, they averred that they had sustained damage by reason of the death of their son, Lester M. Koons, on April 23, 1915, on which day their cause of action in that proceeding, if any they had, accrued. The same persons, John L. and Malinda D. Koons, are the designated beneficiaries in this proceeding, brought by their agent, John L. Koons, Administrator, under the Federal law, and the judgment on the verdict, entered in the court below, represents the damage sustained by them by reason of the death of their son on April 23, 1915, through the alleged negligent act of defendant. Their loss occurred on that day and their right to damages under

the Federal act accrued on that day, provided they could show that the defendant was negligently responsible for the death of their son. It is idle to say that on September 23, 1921, when letters on the estate of Lester M. Koons were issued, more than six years after the commission of the alleged negligent act which resulted in death, a new cause of action against the defendant accrued to John L. Koons, Administrator, to recover for the benefit of himself, in his individual capacity, and his wife, damages which they sustained on the day death occurred. So far as the defendant is concerned, its liability for negligence accrued on the day of the unfortunate accident, which resulted within a few hours thereafter in the death of its employe, at which time the surviving parents, the real parties in interest, sustained their loss. From that date on, it was within the power of the surviving father, who under the laws of Pennsylvania was entitled to administer the estate of his unmarried son, to take out letters of administration, and institute suit for the benefit of himself and his wife. In his failure to do so for more than two years after the date of death, he was guilty of laches. When suit was instituted, his right to recover as an administrator for the benefit of himself and wife had been lost, and the liability of the defendant had ended. In the first suit brought by John L. and Malinda D. Koons under the state law, while it is true no affidavit of defense was filed for the reason that none was required, the attention of counsel for plaintiffs, before the close of the case in chief, was called to the fact that both the defendant company and the deceased employe had been engaged in interstate commerce at the time of the occurrence of the alleged negligent act, and that, therefore, the Federal Act controlled. Plaintiffs elected, however, to stand on the suit as brought, contending that the deceased had not been engaged in interstate commerce at the time of the happening of the accident. The plaintiffs in that position were not sustained by the trial Court or by the Supreme Court of Pennsylvania, the judgment being that the deceased employe had been engaged in interstate commerce and that, therefore, there could be no recovery in the suit as insti-

tuted. It is regrettable that if the surviving parents, real parties in interest, had a good cause of action against this defendant, it has been lost, but the defendant was in no way responsible for this result.

While the amount of the judgment in this case is not great, the principle involved is of the utmost importance to petitioner and other railroad companies. Under Pennsylvania law, there is no limitation as to the time within which letters of administration must be taken out. The survivors of an employe who had been killed could wait, say fifteen years, twenty years or thirty years before taking out letters, and then have two years thereafter within which to institute suit, if the judgment of the learned Court below is correct. Under the law a common carrier is obliged to preserve its records for only seven years and the bringing of a suit could be deferred until all records had been destroyed, when it would be impossible to determine whether the deceased employe had been engaged in interstate commerce at the time of the accident. The first section of the Act of Congress, as pointed out by the Supreme Court of Georgia in the Brooks case, negatives any such idea. The right of action in case of the death of an employe is given to his or her personal representative for the benefit of the surviving widow or husband and children of such employe, and, if none, then to such employe's parents, and if none, to the next of kin dependent upon such employe. The right is not for the benefit of the estate generally but for persons dependent upon the employe at the time of death, indicating that the action is to be brought promptly after the commission of the negligent act. The cause of action is complete when death results from the negligent act complained of and the designated beneficiaries sustain their loss. The matter of securing the appointment of a personal representative to enforce the cause of action is wholly within the control of the beneficiaries. The common carrier is under no obligation to move, and its right to the defense of the two year limitation, fixed by the Act, should not be swept aside by permitting the beneficiaries to allow more than six years to elapse before raising

up a plaintiff to institute a suit to enforce their cause of action.

As the present suit was not brought within two years after the date of death, when the cause of action accrued, there can be no recovery.

> "An action in a state court founded upon the Employers' Liability Act of April 22, 1908, must fail where the record shows that it was not begun until the time had elapsed, after which, under section 6 of that Act, no action shall be maintained."
> Atlantic Coast Line *vs.* Burnette, 239 U. S. 199.

Respectfully submitted,

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